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Supreme Court, U.S.
FILED

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No.

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In The

Supreme Court of the United States

October Term, 1996

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DEBORAH A. POPE,

Petitioner,

v.

LAWRENCE A. POPE, JR.,

Respondent.

♦

Petition for Writ of Certiorari
to the Supreme Court of the State of Illinois

♦

PETITION FOR WRIT OF CERTIORARI

♦

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33 pp

QUESTION PRESENTED

Whether the Illinois civil courts can deny an indigent litigant the right to appeal loss of custody of the litigant's only child by requiring the litigant to pay for trial transcripts and court fees as a precondition to pursuing an appeal.

PARTIES

Petitioner: Deborah A. Pope

Respondent: Lawrence A. Pope, Jr.

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Deborah A. Pope respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Illinois in this case.

♦

OPINIONS BELOW

The June 5th, 1996 order of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal is unreported, but is reprinted in Petitioner's Appendix A.

♦

JURISDICTION

The judgment of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal was issued on June 5th, 1996. App. A. Petitioner filed a Motion to Stay the Mandate of the Supreme Court of Illinois Pending Application for Certiorari in the United States Supreme Court, and the order staying the mandate of the Supreme Court of Illinois pending resolution by the United States Supreme Court of such application was issued July 3rd, 1996. App. B.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment XIV:

...No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rule 298,

Application to Sue or Defend as a Poor Person:

(a) Contents. An application for leave to sue or defend as a poor person shall be in writing and supported by the affidavit of the applicant or, if the applicant is a minor or an incompetent, by the affidavit of some other person having knowledge of the facts, stating:

(1) the applicant's occupation or means of

subsistence;

(2) the applicant's income for the year preceding the application;

(3) the source and amount of any income expected by the applicant;

(4) the nature and value of any property, real or personal, owned by the applicant;

(5) the particulars of all applications for leave to sue or defend as a poor person made by the applicant or on his behalf during the year preceding the application;

(6) that the applicant is unable to pay the costs of the suit; and

(7) that the applicant has a meritorious claim or defense.

(b) Ruling. If the application is denied, the court shall endorse the fact of denial on the application. If the application is granted, the court shall enter an order allowing the applicant to sue or defend as a poor person.

Illinois Supreme Court Rule 312,

Docketing Statement

(a) Appellant's Docketing Statement. All appellants, including cross-appellants and separate appellants, whether as a matter of right or as a matter of the court's discretion, shall file a docketing statement with the clerk of the reviewing court...The docketing statement shall be accompanied by any written requests to the circuit clerk or court reporter for preparation of their re pective portions of the record on appeal and be served on all parties to the case with proof of service attached...

Illinois Supreme Court Rule 321,

Contents of the Record on Appeal

The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, unless the parties stipulate for, or the trial court, after notice and hearing, or the reviewing court, orders less. The common law record includes every document filed and judgment and order entered in the cause and any documentary exhibits offered and filed by any party. Upon motion the reviewing court may order that other exhibits be included in the record. The record on appeal shall also include any report of proceedings prepared in accordance with Rule 323. There is no distinction between the common law record and the report of proceedings for the purpose of determining what is properly before the reviewing court.

Illinois Supreme Court Rule 323,

Report of Proceedings

(a) Contents; Preparation. A report of proceedings may include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal. The report of proceedings shall include all the evidence pertinent to the issues on appeal...Within the time for filing the docketing statement under Rule 312 the appellant shall make a written request to the reporter to prepare a transcript of the proceedings that appellant wishes included in the report of proceedings...

(b) Certification and Filing. Each shorthand reporter who transcribes a report of proceedings shall

certify to its accuracy and shall notify all parties that the report of proceedings has been completed and is ready for filing...

(c) Procedure If No Verbatim Transcript Is Available (Bystander's Report). If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. The proposed report shall be served on all parties within 28 days after the notice of appeal is filed. Within 14 days after service of the proposed report of proceedings, any other party may serve proposed amendments or an alternative proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so certified shall be included in the record on appeal.

STATEMENT OF THE CASE

The pivotal issue in this case is simple, yet of momentous import - the custody of a child. Petitioner and Respondent were divorced in 1990, when their minor child, Larry, was 2 years of age. For the next five years the child resided with his mother, Petitioner. From 1990 through 1994, health care and other providers reported to The Department of Children and Family Services (DCFS), pursuant to the Mandatory Reporting Act, that the child

evidenced signs of sexual and/or physical abuse. The mother, Petitioner, never made any reports of sex abuse herself, and at no time were any allegations made by any party or agency that Petitioner had physically and/or sexually abused the minor child. In 1993, following certain reports made by third parties to DCFS, the child's father, Respondent herein, filed pleadings with the Domestic Relations Court in DuPage County. Respondent sought to modify the Judgment of Dissolution from joint legal custody and residential placement with Petitioner to sole legal and residential custody of the parties' one and only child with Respondent. Petitioner vehemently objected to the proposed modification and a trial ultimately ensued.

Petitioner continuously and consistently fought the Petition for Modification for over three years. In so doing, she expended in excess of $250,000.00 on attorney's fees alone and an additional $50,000.00 on expert's fees. These sums included Petitioner's own assets, including liquidation of Petitioner's pension funds, as well as monies borrowed from family, including funds secured by her brother who took a second mortgage on his residence in order to secure the monies needed. Petitioner, previously employed in a management position, lost her job as a result of the numerous court appearances required and the vast amounts of time necessarily devoted to the case. Due to the Petitioner's indigence and inability to obtain counsel, from March 1994, through July of 1994, the Petitioner represented herself, during which time several substantive hearings were held.

Finally, having depleted all monies and assets available to her, in February, 1995, Petitioner had no alternative but to file a Petition for Bankruptcy pursuant to Chapter 7 of the Bankruptcy Code. Shortly thereafter, Petitioner filed a pauper's petition in the Circuit Court of DuPage County, and on March 1, 1995, Petitioner was granted pauper status. Said order granting Petitioner pauper status has never been vacated and remains in full force and effect.

During the bitterly contested custody case, the trial court, Judge Noland, appointed attorney Richard D. Felice as both Guardian ad Litem (GAL) and Attorney for the Minor Child (AFMC). In May of 1994, long before the commencement of trial, Richard D. Felice filed a Motion to Withdraw as GAL/AFMC alleging his belief that he had been "personal[ly] attack[ed]" by Petitioner by her filing an Emergency Motion for Continuance on her own behalf (she was pro se at that time) and by further stating that he no longer believed he could be objective in representing the minor's interests due to the perceived "personal attack." Despite the fact that the GAL/AFMC clearly informed the court in his written motion and in argument on the record that he could no longer be objective in the case, Judge Noland summarily denied the motion.

On June 26, 1995, after approximately 30 days of trial testimony which occurred over a period of nine months, Judge Paul Noland entered his order granting Respondent's petition for modification and wrested custody of the minor child from his mother, Petitioner.

Testimony of Richard Felice was considered by the court. The order provided for many terms and conditions, certain of which will be discussed below. The day the court's Memorandum Opinion was issued on June 15, 1995, but before the court's final order was filed and entered on June 26, 1995, Respondent appeared at Petitioner's residence and removed the child from his mother's care, even though no order had yet been entered.

At no time were any allegations made by any party or agency that Petitioner had physically and/or sexually abused the minor child, nor was any finding ever made by the trial court that Petitioner had physically or sexually abused the minor child.

Following entry of the trial court judgment, Petitioner requested that trial transcripts be prepared for purposes of Petitioner's appeal, without cost to Petitioner, pursuant to the pauper order. The DuPage County Court Reporters served as the court stenographers during the over 30 days of trial. Despite the order of court evidencing Petitioner's pauper status, the reporters denied Petitioner's requests that the trial transcripts be prepared for appeal, without cost to Petitioner, and instead demanded deposit fees before beginning preparation of the transcripts. The total deposit fees demanded by the reporters totalled over $5,000.00; the total cost of the transcripts is, of course, unknown.

Subsequently, Petitioner brought a motion requesting that the trial transcripts be provided without

charge, pursuant to her pauper's status. Judge Paul Noland, the trial judge who ordered that custody of the child be removed from Petitioner, denied Petitioner's motion. Without transcripts, Petitioner could not appeal Judge Noland's decision.

Petitioner timely filed her Notice of Appeal with the appellate court, which time and time again, following the filing of various motions, consistently refused to grant to Petitioner review of Judge Noland's ruling denying Petitioner trial transcripts in forma pauperis or any other order of Judge Noland.

Petitioner, an indigent, having been declared a pauper and a bankrupt, is without assets or funds with which to obtain transcripts. Despite the fact that Petitioner had been granted pauper status and despite the fact that she provided the trial court a current Affidavit of Income and Expense demonstrating her continued indigency, the trial court refused to honor Petitioner's pauper status and refused to grant Petitioner a copy of the trial transcripts in forma pauperis, amongst other relief, when Petitioner timely filed her post-trial motion requesting same.

Pursuant to the Illinois Supreme Court Rules, Petitioner cannot file an appellate brief without first having obtained a transcript of the proceedings in the trial court. Illinois Supreme Court Rules 312, 321, 323.

On September 27, 1995, Petitioner, in compliance

with Illinois Supreme Court Rules, filed a Docketing Statement, the Record on Appeal, Notice of Filing Same, and an Affidavit of Intent to File Petition for Leave to Appeal. On September 29, 1995, Petitioner filed with the Supreme Court of Illinois a Petition for Leave to Appeal to the Supreme Court from the State of Illinois Appellate Court Second District, Petitioner-Appellant's Motion to Waive Costs and Fees, Petitioner-Appellant's Emergency Motion Pursuant to Illinois Supreme Court Rule 383, and Petitioner-Appellant's Emergency Motion to Stay Proceedings in the Appellate Court; all of which contained allegations that the due process and equal protection rights - pursuant to the Illinois and the United Stated Constitutions - of both the Petitioner and her minor child had been violated. On October 13, 1995, the Supreme Court of Illinois denied Petitioner's motion to stay the proceedings in appellate court. On October 26, 1995, the Supreme Court of Illinois denied Petitioner's motion for a supervisory order; and on November 14, 1995, the Supreme Court of Illinois denied Petitioner's motion to waive costs and fees.

On December 1, 1995, the State of Illinois Appellate Court Second District on its own motion ordered that Petitioner be allowed 30 days to file her brief or the appeal would be dismissed without further notice. On December 6, 1995, the Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal.

On December 21, 1995, Petitioner timely filed with the State of Illinois Appellate Court Second District an Emergency Motion to Grant Petitioner-Appellant a

Transcript of the Proceedings at Trial In Forma Pauperis, an Emergency Motion to Extend Time for the Filing of Petitioner-Appellant's Docketing Statement, the Transcript of Proceedings at Trial, and Record on Appeal, and Petitioner-Appellant's Emergency Motion to Stay Proceedings in the Appellate Court, all of which also contained allegations that both the Petitioner's and her minor child's rights to due process and equal protection pursuant to both the Illinois and the United States Constitutions had been violated. On January 4, 1996, the State of Illinois Appellate Court Second District denied all of Petitioner's then-pending motions.

On January 12, 1996, the State of Illinois Appellate Court Second District on its own motion ordered that Petitioner be allowed 10 days to file her brief or the appeal would be dismissed without further notice. On February 6, 1996, the State of Illinois Appellate Court Second District on its own motion dismissed the appeal due to the failure of Petitioner to file her brief - which was impossible without having first obtained the transcript in order to point out the errors committed by Judge Noland, the trial judge.

On February 27, 1996, Petitioner timely filed with the State of Illinois Appellate Court Second District an Affidavit of Intent to File Petition for Leave. On March 12, 1996, Petitioner timely filed with the Supreme Court of Illinois a Petition for Leave to Appeal to Supreme Court from the State of Illinois Appellate Court Second District. On June 5, 1996, the Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal, and

ordered that the mandate of the Court would issue to the Appellate Court on June 27, 1996. In response to the numerous motions Petitioner filed with the appellate and the supreme courts of Illinois, Petitioner was never given the court's reasoning behind their decisions, but was instead simply summarily denied. Each and every motion filed by Petitioner was met with an order of court summarily denying the relief requested, without comment or opinion, and denying Petitioner's request for argument.

Petitioner then filed with the Supreme Court of Illinois a Motion to Stay the Mandate, and on July 3, 1996, the Supreme Court of Illinois entered its order staying the mandate of the Court pending Petitioner's application for certiorari in the United States Supreme Court. The federal issues of denial of due process and equal protection of the law pursuant to both the federal and state Constitutions were then, properly and timely raised in Petitioner's motions in both the State of Illinois Appellate Court - Second District, and the Supreme Court of Illinois.

Lastly, although the present case involves private litigants, the actions of the State of Illinois Appellate Court - Second District in dismissing Petitioner's appeal for not filing her brief alleging the errors Petitioner maintains were committed, and the actions of the Supreme Court of Illinois in denying Petitioner's Petition for Leave to Appeal constitute "state action" so as to render the present case reviewable under the Fourteenth Amendment. See e.g., *Bankers Life & Casualty Co., v. Crenshaw*, 486 U.S. 71 (1988); *Lindsey v. Normet*, 405 U.S.

56 (1972).

REASONS FOR GRANTING THE WRIT

I. The decision of the Supreme Court of Illinois raises an important question of federal constitutional law, and conflicts with the reasoning of this Court's decisions in *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Boddie v. Connecticut*, 401 U.S. 371 (1971).

This Court has recognized that parents have a "fundamental liberty interest" in the care, custody, and management of their children which is protected by the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 751, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982). In Illinois, if a party wishes to gain access to an appellate court for review of a trial court's actions in a civil case, the party must first tender to the court reporter a written request to prepare a transcript of the proceedings at trial. The court reporter then in turn requires a monetary deposit from the appellant, which is based on the total cost of the transcript, in order to complete the transcript, certify same, and submit it along with other necessary documents and certifications from the circuit clerk, to the reviewing court. An appeal in Illinois state courts cannot proceed without a trial transcript (or a certified and/or stipulated bystander's report based upon recollection, which in this lengthy, bitterly contested and substantive trial, would be impossible to obtain). Illinois Supreme Court Rules 321, 323. As such, if a party can afford to

purchase a trial transcript, they can proceed with an appeal to review a trial court's actions and decisions; if a party is indigent, that person's access to a reviewing court is then eliminated - effectively creating a classification based upon wealth as a result of the application of the Illinois statutes and rules in violation of the Equal Protection Clause of the Fourteenth Amendment. The end result is that in Illinois, a party's access to a reviewing court is determined by their financial status - a party who has money has open access to all courts, including reviewing courts, whereas a party who is poor is denied the ability to have a trial court's actions reviewed for errors - even when the issues involve the custody of a party's only child - merely because that party does not have enough money to purchase requisite transcripts or pay requisite fees.

It is well-settled law that in criminal matters, a defendant's due process rights have been violated if the defendant has been denied access to the courts as a result of the defendant's indigence. In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court considered an Illinois law which denied a person convicted of a crime full appellate review if they could not pay for the necessary trial transcript. In holding that when a state provides an appellate procedure in criminal cases, the state must also provide the same access to indigents by providing them with a transcript (or an equivalent), or be in violation of the due process and equal protection clauses of the Fourteenth Amendment, Mr. Justice Black, writing for the majority, stated:

> Such a denial is a misfit in a country

> dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts...There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. *Griffin* at 18-20.

The major concern for the courts in the *Griffin* case was the fact that the defendant was facing the possibility of *imprisonment*, a loss of his freedom. It was that potential loss of freedom, the threat of incarceration that spurred the Court to grant to the defendant the right to a court of review, because the errors the trial court had committed would never have been addressed had he not possessed the right to a court of review, thereby making the right to access to the courts meaningless.

After Griffin, this Court decided *Mayer v. City of Chicago*, 404 U.S. 189 (1971), which involved a defendant who had been convicted of disorderly conduct, and interference with police officers, which were both simple ordinance violations, punishable only by the imposition of fines, as opposed to incarceration. Illinois statutes at the

time drew a distinction between felony and ordinance violations when providing to indigents trial transcripts in forma pauperis, ostensibly because only felony convictions could result in the defendant's imprisonment. This Court held that the duty of the state is to provide indigents with as adequate and effective appellate review as that given appellants with funds - regardless of the possible sentence, and in terms of the trial record (trial transcript), the state must afford the indigent with a record of sufficient completeness to allow for a proper consideration of his claims of error, so as not to impede the open and equal access to courts - including courts of review - based on wealth. *Mayer* at 192.

In the *Mayer* case, the defendant was facing the possibility of the imposition of a *monetary fine*; no threat of imprisonment, no threat of the loss of freedom. Yet this Court extended its ruling from *Griffin* and held that access to courts - including courts of review - could not be hampered due to a distinction based on wealth. Can this Court now make such a distinction in cases involving the *custody* of children? Can this Court, in good conscience, choose to allow such a distinction to stand, when doing so will prevent only the poor from appealing custody cases, but allow the affluent open and unimpeded access to the same courts?

Then, in 1971, this Court decided the seminal case of *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, in which the Court rendered a decision which for the first time, addressed the rights of indigents being denied access to civil courts due to their poverty.

In *Boddie*, the Court was presented with a dismissal of a class-action suit brought on behalf of female welfare recipients who wanted a divorce, but could not obtain a divorce because they did not have the requisite $60.00 filing fee. This Court reversed the ruling dismissing the litigation, holding that due process prohibits a state from denying access to its courts to those who wish to obtain a dissolution of marriage based solely on a person's inability to pay a fee. Recognizing the importance of the institution of marriage in society, this Court held that a state must provide to all persons a "...meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie* at 379.

Subsequent to *Boddie*, this Court has long wrestled with the question of whether access to civil courts of review is a right guaranteed by due process. By deciding *Boddie* however, the door to this issue was opened, and this Court can no longer afford to allow the question to go unanswered. We cannot, consistently with equal protection, but especially the due process clause of the Fourteenth Amendment, say to a party: "you have a right to access to the courts, but that right extends only to wealthy people when it comes to courts of review." If there is a right to access to the courts in both the criminal and civil contexts, that right cannot, and should not be curtailed by the application of statutory constructions which serve to allow only the affluent entry. To hold otherwise, would be to effectively prevent indigents from obtaining review of errors committed at trial. *Meltzer et. al. v. C. Buck LeCraw & Co., Sup. Ct. Ga.*, 402 U.S. 954, 958 (1971).

The line of reasoning this Court has utilized in the cases cited began with a case in the criminal arena, ostensibly because the threat of imprisonment loomed over the defendant. This Court has now recognized that there are other matters which involve issues of equal importance as that of one's freedom, and that is *custody of one's children*, in addition to other issues involved in matrimonial cases. One cannot give lip service to these issues surrounding matrimonial cases, especially ones involving the custody of children, and then deny Petitioners embroiled in custody disputes access to courts of review to redress errors committed by the trial court. No court of review would claim that errors are not committed at the trial level. Can errors committed at trial be allowed to stand unanswered and unaddressed in cases involving the custody of a child, but complete appellate review be provided to indigents facing *ordinance violations?*

In the present case, Petitioner was declared and found to be a pauper during the pendency of the trial. Subsequent to the court's judgment transferring custody of Petitioner's only child from her, the official court reporters informed Petitioner's appellate counsel that the amount necessary for her to deposit with them as and for a downpayment for the preparation of the trial transcript was $5,000.00. The court reporters, like the Appellate Court and the Supreme Court after them, were wholly uninterested in Petitioner's pauper status. Despite the fact that Petitioner had been granted pauper status, all applications, motions and endeavors Petitioner made to the Illinois Appellate Court and the Supreme Court of

Illinois to obtain a copy of the trial transcript in forma pauperis were summarily denied, time and time again, without hearing, and ultimately resulted in the dismissal of Petitioner's appeal. So a woman who lost custody of her one and only son cannot appeal because she is now poor, and so she is turned away. Why is she poor? She was not poor when the litigation commenced, but, instead, was reduced to becoming an indigent and a bankrupt, as a result of defending her rights in the very litigation whereas the system allows defendants faced with ordinance violation sentences (fines) free and open access to courts of review.

The record below is replete with evidence of Petitioner's efforts to obtain the trial transcript in forma pauperis, without which she cannot expose the errors committed by the trial court in the determination of the custody status of Petitioner's son. An appeal is the only method by which Petitioner can challenge a custody decision of a trial court. Once the trial court's decision was rendered, Petitioner was left without any other means to challenge or question the actions of the trial court merely because she did not have the money to purchase a trial transcript to expose the errors which were committed at the trial which resulted in the custody of her son being taken from her. The issue which was decided by the trial court was custody of the parties' only child; the issue did not involve money damages, contracts, or questions of liability. The issue was who would be awarded custody and who would have custody taken from them. To state that custody of one's child is a "fundamental liberty interest" is frankly, stating the

obvious. Without the transcript, Petitioner is completely precluded from exposing the errors she alleges were committed by the trial court, and further, without that trial transcript, she is prohibited from presenting her arguments to an appellate court; something she could do had she the necessary funds. Petitioner has been denied access to a reviewing court solely because of her indigence, on a matter of fundamental liberty interests such as her right to custody of her child. As a result of her inability to pay for a trial transcript necessary to prosecute an appeal, and despite the fact that Petitioner was found to be a pauper pursuant to state and local court rules, she is totally precluded from obtaining review of errors which were committed at trial, and which ultimately resulted in the loss of custody of her only child. The justice system says to this Petitioner, and to every Petitioner in the same situation, that if you're poor, whether at the inception of the litigation or as a result of the litigation, you have no right to "right" the errors committed by the trial court, only the rich have that privilege.

Although Illinois allows for appeals to proceed if no verbatim transcript of the evidence of the proceedings is available, the statutory procedure clearly is inapplicable and cannot suffice in this situation. Illinois Supreme Court Rule 323(c) allows for obtaining a report of proceedings "...from the best possible sources, including recollection." The present case involves a complex, bitterly contested custody case, which took place over a period of nine (9) months, and comprised over thirty (30) days of trial time. Many experts and other witnesses

testified. It would be a literal impossibility for any party, let alone a non-lawyer without previous legal knowledge or training to attempt to draft a report, weeks and/or months later, of the testimony, rulings and events that transpired at trial. The court file alone is wholly inadequate to convey to the reviewing court that which occurred during the trial, particularly in view of the role of counsel on appeal, wherein specific detailed information as to the entirety of the trial proceedings is essential to clearly delineate trial court errors sufficient for appellate review. Without the trial transcript, Petitioner's counsel cannot state with the degree of specificity required how and when the trial judge erred. Consequently, the justice system denies the Petitioner access to appellate review because she is poor, and, in so doing, the system effectively denies her a lawyer. What lawyer can step into an appeal without a trial transcript - no lawyer can.

Petitioner's current counsel was not trial counsel. As such, current counsel was not present during the trial, was not witness to errors which occurred, and, therefore, cannot make even a good faith attempt at describing with enough particularity for an appellate court the alleged errors committed by the trial court. The fact that Petitioner, a non-lawyer, could not be asked to fully and completely recall, let alone comprehend, the legal ramifications and effect of events that transpired at trial, and the fact that present counsel was not trial counsel, both lead to the inevitable conclusion that without a copy of the trial transcript in forma pauperis, this Petitioner, like others in her situation across every courtroom in this

country, is systematically prohibited from obtaining review of trial court actions in a case which resulted in the loss of custody of Petitioner's child. This Court has held as a matter of statutory construction, that new counsel on appeal in federal courts must obtain a transcript of prior proceedings in order to effectively represent a client. *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331. As stated by Justice Rives (and as quoted by the majority in *Boddie*):

> The Fourth Circuit has expressed my thoughts on this subject: 'In a direct appeal *** a full transcript of the trial would be the basic starting point for any lawyer undertaking to handle the appeal if he had not participated in the trial.' *United States v. Shoaf*, 4 Cir. 1964, 341 F.2d 832, 834-835, both as cited in *Brown v. Chastain*, 416 F.2d 1012, at 1024 (CA5 1969) (Rives, J., dissenting).

Petitioner is, therefore, denied access to effective assistance of counsel as well as being denied access to a civil court of review. The court system not only prevents Petitioner from trying to right wrongs committed by the trial court, but further continues its barrage of Petitioner by preventing her from having an attorney who has not been legally blindfolded. What reason could possibly be offered as justification as to why Petitioner cannot proceed with her appeal and why Petitioner effectively cannot have an attorney represent her? Because in defending her right to retain custody of her child, which

case was brought by the father only after others made reports against the father, Petitioner became poor. She has been bankrupted and has been declared an indigent by the very court that now denies her access to trial transcripts so that the court's own decision can never and will never be reviewed. Petitioner's case cannot be appealed because she doesn't have the money to pay court reporters. Are there no other means by which a state can prevent frivolous suits from being filed, other than by instituting and administering statutes, which although they violate the Fourteenth Amendment, nevertheless allow the state to defray costs? For that is the reason which has been offered by various states as justification for the imposition of fees - that the imposition of fees for filing an appeal or obtaining a transcript is to prevent an overly litigious party from pursuing a frivolous or non-meritorious claim to appeal. However, such prioritizing - forfeiting a person's access to a reviewing court in a *custody* case in a feeble attempt to curb frivolous claims from being filed - cannot be proffered as a reasonable means to an end, and cannot be tolerated in a society which claims to hold due process and equal protection in highest esteem. There exist too many other methods by which a state can curtail overzealous litigious parties from pursuing fruitless claims.

If the Petitioner in the present case is to be denied a copy of the trial transcript in forma pauperis, then our courts effectively say to her that an indigent person faced with the prospect of a simple monetary fine has a right to a court of review - as in *Mayer* - whereas a person who is faced with the loss of custody of their child does not have

the same exact right. That premise cannot stand consistent with the decisions this Court has made in *Griffin* and *Boddie*. A person either has a right, or they do not. Once the right to unhampered access to the courts has been granted and established, there can be no reason proffered which could withstand logical attack for any discrimination in the application of any statutory construction which differentiates between people based solely on wealth.

If Petitioner is denied access to a reviewing court because she does not have the money with which to purchase the trial transcript, the practice of the Illinois courts will continue to operate in violation of a party's right to equal protection by making an appeal the privilege of only the affluent, perpetuating discrimination against the indigent, and the same practice will operate to violate a party's right to due process of law by denying a petitioner the sole means of obtaining review of errors committed at trial, all in violation of the Fourteenth Amendment.

II. This Court has granted certiorari to a case currently pending and set for oral argument entitled *M.L.B. v. S.L.J. Individually and as Next Friend of the Minor Children, S.L.J. and M.L.J., and his Wife J.P.J, No. 95-853*, which presents a similar situation as the present case, and involves fundamental rights of parents to the custody and care of their children.

This Court has granted certiorari to a case out of Mississippi entitled *M.L.B. v. S.L.J. Individually and as*

Next Friend of the Minor Children, S.L.J. and M.L.J., and his Wife J.P.J., No. 95-853, which involves the termination of the parental rights of the Petitioner. In the *M.L.B.* case, Petitioner was prevented from pursuing appellate review of the actions taken by the Chancery Court due to the Petitioner's inability to pay the costs of preparing and transmitting the trial record, the bulk of which costs were for the trial transcript. In the Mississippi case, the Petitioner was precluded from prosecuting her appeal because of her indigence.

The *M.L.B.* case involves a woman (Petitioner M.L.B.) and a man (Respondent S.L.J.) who had been married with two children, who subsequently divorced. After the divorce, the Respondent remarried and subsequently moved to terminate the parental rights of Petitioner, the natural mother of the children, and to have Respondent's new wife then adopt the children. Petitioner filed a counter-claim seeking primary custody of the children, and seeking to have Respondent held in contempt of court for his refusal to allow visitation. After a trial on the merits, the Chancery Court issued an order which terminated the parental rights of the Petitioner, and allowed the Respondent's new wife to adopt the children. Petitioner complied with every appellate procedural requirement other than the remittance of the amount required for the preparation and transmittal of the record, including the trial transcript, all to no avail as ultimately, after the filing of many motions asking for relief were denied, the Supreme Court of Mississippi ordered the appeal finally dismissed.

In the present case, as in the Mississippi case, the Petitioner has had her child taken from her, and it is irrelevant that in one case, the Petitioner's parental rights were terminated, and that in the present case, the Petitioner's child was taken from her custody. It is irrelevant that one case involved a termination, and the other involved a change of custody because both cases resulted in the elimination of the Petitioners' access to their children. What is relevant to this inquiry is custody of one's children, and whether our court system can continue to prohibit indigents from challenging decisions which determine custody status, while allowing the affluent open access to courts of review.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD , ILLINOIS 62701
(217) 782-2035

June 5, 1996

Ms. Carol G. Kokinis
The Law Offices of Beverly A. Pekala, P.C.
30 North LaSalle Street, S#4300
Chicago, IL 60602

No. 80693 - Deborah A. Pope, petitioner, v. Lawrence A. Pope, Jr., respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1996.